No. 14512

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED W. STEINER,
JOHN W. HADZIMA,
ROY PURSSELLEY,
NICHOLAS SPICUZZA,
OLIVE SPICUZZA,
GEORGE TODD
and CHARLES WALKER,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

HAROLD P. LASHER
530 Broadway, Suite 1048
San Diego, 1, California

Attorney for Appellant,
JOHN W. HADZIMA

Printed by San Diego Offset Printing Co. - 133 F Street - BE 2-1528

TABLE OF AUTHORITIES CITED

CASES

No. 14512

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED W. STEINER, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE HONORABLE JUDGES THEREOF.

Comes now JOHN W. HADZIMA, one of the appellants in the above entitled cause, and presents this, his petition for a rehearing of the above entitled cause, and in support thereof, respectfully shows:

I

That the grounds upon which the appellant JOHN W. HADZIMA relies for this his petition for rehearing are the following:

1. The Appellate Court overlooked in a point a certain argument; that said argument was that

the government and not the appellant had the burden to dispel the presumption that communications between jurors and third persons are prejudicial to the rights of appellant.

2. The Appellate Court misapprehended an argument in a material way; that said argument so misapprehended was that the Trial Judge should have interrogated the rest of the jurors, and should have inquired into their knowledge of the two contacts; and if any, the panel being tainted should have applied the conclusive presumption of prejudice.

II

It is important that defendants be afforded a fair trial. In that respect defendants should be tried by impartial jurors who are not disturbed by outside influence or even mere opinion (verbal, newspaper or otherwise); nor by the least amount of guidance respecting any part or portion of the evidence which might or could be substituted by the juror in place of the evidence presented in the trial of the matter.

The Trial Judge had the foregoing in mind, he said: "It is well settled that communications relative to a case on trial between jurors and third persons or witnesses are not only improper but also presumptively prejudicial to the rights of defendants". (Record on appeal page 38). In the instant case two such known contacts occurred between a juror and a third person during the course of the trial. In relation thereto, the Trial Judge stated: "It likewise cast upon the government the burden to dispel such presumption and to show that no prejudice would or could result to the defendants or any of them. (Record on appeal page 39).

The following cases being cited:

Wheaton vs. U. S., (Cir. 1943) 133 F. 2d 522; Chamber vs. U. S., (8 Cir. 1916) 237 Fed. 513; Lewis vs. U. S., (1 Cir. 1924) 295 Fed. 441; Klose vs. U. S., (8 Cir. 1931) 49 F. 2d 177; Cavness vs. U. S., (9 Cir. 1951) 187 F. 2d 719; U. S. vs. Rakes, (D. C. E. D. Va) 74 Fed. Supp. 645.

In connection with the motion for a new trial, based primarily upon the ground that a juror, to-wit, GLORIA ANN MILLER, had been in contact with a government witness, to-wit, LEE HEFNER, the Trial Judge also knew that another of the jurors, to-wit NANCY JARVIS had talked to a relative of the defendant FRED W. STEINER (Record on appeal, pages 51, 52 and 53).

After the juror NANCY JARVIS, had talked to the relative of the defendant FRED W. STEINER, the matter came to the attention of the Trial Judge when the juror Mrs. Jarvis called the Trial Judge to advise him of her discussion with this person. (Record on appeal pages 51 and 52).

Contrasted with the contact of the juror GLORIA ANN MILLER, by the government witness LEE HEFNER, the juror GLORIA ANN MILLER had not acted in such good faith; did not call the Trial Judge, but clandestinely or otherwise withheld this information from the Court in spite of the Court's admonitions. Such action on her part gives way to suspicion and conjecture regarding her good faith in disclosing her entire conversation with the government witness, LEE HEFNER. It would seem that her statements regarding her conversation with this government witness should have been viewed with distrust; and should have placed the

Court on further inquiry regarding the knowledge, of these contacts, of the entire jury panel.

Following the Jarvis incident, the Court stated in its opinion: "I also suggested that I interrogate all the jurors as to whether they had discussed the case with anyone or whether anyone had discussed or attempted to discuss the case with them". (Record on appeal Page 53).

In view of the foregoing, since the Trial Judge already had in mind interrogating the rest of the jurors following the Jarvis incident, this should have been done when the Hefner-Miller matter came to his attention. In the Cavness case, 187 F. 2d 719 (9 Cir. 1951) it states in effect, that where the irregularity has tainted the panel, prejudice must be conclusively presumed.

It is appellant Hadzima's contention that the Trial Judge did not go far enough in dispelling the presumption of prejudice; that there is left to conjecture whether the jury panel was tainted. The burden rested on the government in the exercise of the Trial Judge's discretion to fully dispel any possibility that the jury had by now become prejudiced toward the defendant. This burden it would seem could not be waived by a defendant or defendants since the matter would tend to go to the essence or substance of the trial; was not strictly a procedural matter. Briggs vs. U. S., (6 Cir. 1955) 221 F. 2d 636, 639.

It is appellant Hadzima's further contention that a reasonable doubt now exists that other jurors did not know of the Jarvis and Miller contacts.

The Trial Judge or the government, while having the burden of proof to dispel the presumption of prejudice neither questioned juror Jarvis nor juror Miller regarding whether either or both spoke to any of the jurors respecting their contacts with third persons. The other jurors were not questioned whether they spoke to anyone or discussed with anyone the matter of the Jarvis and Miller contacts; and if so, what effect it had and the substance of such conversation. Krogmann vs. U. S., (6 Cir. 1955) 225 F. 2d 220, 228 (14).

Particular prejudice was created against the defendant JOHN W. HADZIMA regarding the mention by Hefner of the Humorous incident; referred to in the Court's opinion. (Record on appeal pages 40, 41, and page 42). Briggs vs. U. S., (6 Cir. 1955) 221 F. 2d 636, 638, 639. Hefner said she did mention the so-called humorous incident; Mrs. Miller stated she did not recall mentioning it.

This is to certify that in the opinion of counsel the foregoing petition for rehearing is well founded and is not interposed for the purpose of delay.

HAROLD P. LASHER,
Counsel for Appellant,
JOHN W. HADZIMA

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the United States District Court, Southern District of California, Southern Division, be upon further consideration reversed.

Respectfully submitted,

HAROLD P. LASHER,
Counsel for JOHN W.
HADZIMA.